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No. 00-46

In the Supreme Court of the United States

BRUCE G. MURPHY, PETITIONER

v.

JEFFREY H. BECK,
SUCCESSOR AGENT FOR SOUTHEAST BANK, N.A.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL DEPOSIT INSURANCE CORPORATION AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether Congress has abrogated the longstanding federal common law doctrine established by *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and its progeny and, if not, whether the court of appeals erred in concluding that the applicability of that doctrine should not depend upon whether a bank receivership generates a surplus.

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BRIEF FOR THE UNITED STATES AND THE FEDERAL DEPOSIT INSURANCE CORPORATION AS AMICI CURIAE SUPPORTING RESPONDENT

The question presented in this case is whether Congress has abrogated the federal common law doctrine established by *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and its progeny. For more than half a century, the *D'Oench* doctrine has protected the Federal Deposit Insurance Corporation (FDIC) against secret agreements that may mislead bank examiners or creditors as to the financial condition of federally insured banks. The doctrine has been partially codified and enhanced by Congress. See 12 U.S.C. 1821(d)(9)(A), 1823(e). And the doctrine has been applied in literally thousands of cases, often in tandem with its statutory counterparts, to estop the assertion of claims or defenses against the FDIC, in both its corporate and re-

ceiver capacities, based on secret banking arrangements.[1] The FDIC was the initial defendant in this case, and asserted that petitioner's claims were barred under both the common law *D'Oench* doctrine and Section 1823(e).

The *D'Oench* doctrine (including its statutory protections) serves several important federal interests. First, the doctrine permits federal regulators to rely on bank records in evaluating the financial soundness of federally insured institutions and in safeguarding deposit insurance funds. Reliance on such records is critical, for example, when the FDIC is deciding whether to provide financing for the purchase of the assets of a failed bank and assumption of its liabilities by another bank, 12 U.S.C. 1823(c)(2) and (4)(A), and in conducting the receivership of a failed bank, 12 U.S.C. 1821(d) (1994 & Supp. IV 1998). Second, the doctrine promotes proper lending practices and protects against improper or collusive dealings, particularly on the eve of bank failures. Third, the doctrine protects innocent creditors and depositors of failed banks, including the FDIC, from absorbing losses that would result from recognizing secret banking arrangements, and promotes the prompt and cost-effective resolution of litigation based on unrecorded agreements allegedly made by failed banks.

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[1] Between 1989 and 1995 alone, the FDIC invoked the *D'Oench* principle in more than 5000 cases. See *Hearing on S. 648 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 104 Cong., 1st. Sess. 2 (1995). In 1997, the FDIC issued a policy statement that in cases involving unrecorded agreements made after 1989, the FDIC would ground the assertion of the *D'Oench* principle in its statutory protections. 62 Fed. Reg. 5984. That policy, however, is based on the understanding that Sections 1821(d)(9)(A) and 1823(e) "should be interpreted in a manner consistent with the policy concerns underlying the [common law] *D'Oench* doctrine," and that they "bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the *D'Oench* doctrine." *Ibid.*

STATEMENT

1. In August 1989, petitioner invested about $500,000 in the Orchid Island Associates Limited Partnership (Orchid), which sought to develop a golf and beach club in Florida. To finance the development, Orchid obtained about $50 million in loans from Southeast Bank, N.A. (Southeast). Pet. App. A2, B2. The loan documents provided that "[Southeast] is a lender only and shall not be considered a shareholder, joint venturer or partner of the Borrower." *Id.* at F4 (quoting identical language in first three agreements); see *ibid.* ("In the future, at no time shall Lender be construed as having acted as a joint venturer in or a partner with the Debtor Parties in connection with the Project.") (quoting fourth agreement). Orchid defaulted on those loans; Southeast foreclosed on Orchid's mortgages; and, in September 1991, six months after the last loan to Orchid, Southeast became insolvent and was placed into receivership under the FDIC. *Id.* at A2.

2. a. In August 1992, petitioner filed suit against the FDIC, in its capacity as receiver for Southeast, in the District Court for the District of Columbia, seeking to recover his lost investment. The complaint alleged that as part of its lending transactions, Southeast had secretly become a joint venturer with Orchid, and that as receiver for Southeast, the FDIC was liable for breach of contract, breach of fiduciary duty, accounting deficiencies, fraud, negligent misrepresentation, and securities violations by Southeast. The FDIC moved to dismiss on the ground that petitioner's claims are barred under the common law *D'Oench* doctrine and the related statutory protection afforded by 12 U.S.C. 1823(e), because they are predicated on the existence of a secret joint-venture agreement between Southeast and Orchid. The FDIC further argued that the loan documents, quoted above, that were in the bank's records expressly foreclosed the recognition of any joint-venture relationship

between Southeast and Orchid on the basis of the bank's loans to Orchid. Pet. App. A3, B3.

The district court treated the FDIC's motion to dismiss as a motion for summary judgment and granted the motion, holding that petitioner's claims are barred under both the common law *D'Oench* doctrine and Section 1823(e). Pet. App. B1-B11.

b. The District of Columbia Circuit reversed. Pet. App. C1-C14. The court first noted that petitioner conceded that all of his claims (save one) are premised on the existence of an unwritten joint-venture agreement between the bank and Orchid. *Id.* at C5. The court nevertheless held that Section 1823(e) does not bar those claims because they do not relate to a specific existing asset of the bank, and that the common law *D'Oench* doctrine does not bar the claims because that doctrine was abrogated by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. Pet. App. C2. The court recognized that in the wake of FIRREA, "many courts, including we, have either explicitly stated or implicitly assumed that the federal common law [*D'Oench* doctrine] remains alive and well along side its statutory cousin." *Id.* at C12. But the court concluded that this Court's decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), "appears to leave no room for a federal common law *D'Oench* doctrine." Pet. App. C10.

On remand, the district court transferred the action pursuant to 28 U.S.C. 1404(a) to the Southern District of Florida, noting that the underlying events took place in Florida. Pet. App. D1.

3. a. In May 1998, the District Court for the Southern District of Florida granted the FDIC's motion to substitute respondent as defendant. Pet. App. E1. Respondent stepped into the shoes of the FDIC as a successor agent pursuant to 12 U.S.C. 197, and maintained the FDIC's position that petitioner's claims are barred by the *D'Oench* principle.

In July 1998, the district court granted a pending motion to dismiss, which had been filed by the FDIC and transferred along with the case from the District of Columbia, and held that petitioner's claims are barred under the *D'Oench* doctrine. Pet. App. F5-F6. In doing so, the court observed that "the Eleventh Circuit still adheres to the *D'Oench* doctrine" and has specifically rejected the argument that FIRREA abrogated that longstanding doctrine. *Id.* at F6.

b. The Eleventh Circuit affirmed. Pet. App. A1-A18. The court first concluded that the District of Columbia Circuit's ruling concerning *D'Oench* was not binding upon it as law of the case. *Id.* at A11-A12. Next, the court reaffirmed the Eleventh Circuit's position that the *D'Oench* doctrine has not been abrogated by Congress. *Id.* at A14-A18. The court explained that the presumption is that Congress has not abrogated "a long-standing federal common law rule" unless it "'speak[s] directly' to the question addressed by the common law." *Id.* at A17 & n.7 (quoting *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978)). Here, the Eleventh Circuit concluded, "Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine." *Id.* at A17 (internal quotation marks omitted). And, in the court's view, neither *O'Melveny* nor *Atherton* v. *FDIC*, 519 U.S. 213 (1997), compelled a different conclusion, because those cases involved creation of new federal common law rules. Pet. App. A14-A15.

The court of appeals further held that the *D'Oench* doctrine bars petitioner's claims in this case. Pet. App. A13-A14. The only ground that petitioner pressed for avoiding the common law doctrine (assuming it has not been abrogated) was that the Southeast receivership ultimately generated a surplus. *Id.* at A13. The Eleventh Circuit explained, however, that "[p]ermitting the [*D'Oench*] doctrine to be overridden if a receivership generates a surplus in the future

undermines the doctrine's purpose of enabling the FDIC to make informed and accurate evaluations of a failed bank's assets and liabilities at the outset of the receivership in order to determine the best way to manage the bank's losses." *Id.* at A14.

SUMMARY OF ARGUMENT

I. In *United States* v. *Texas*, 507 U.S. 529, 534 (1993), this Court reaffirmed that statutes should be "read with a presumption favoring the retention of long-established and familiar [common law] principles, except when a statutory purpose to the contrary is evident." Application of that settled canon of statutory construction in this case leads to the conclusion that Congress has not abrogated the long-standing common law *D'Oench* doctrine.

The *D'Oench* case articulated a basic rule of estoppel preventing borrowers from relying on secret banking agreements to defeat interests held by the FDIC. In 1950, Congress codified that principle in certain respects and enhanced it by adding stringent recording and approval requirements. See 12 U.S.C. 1823(e) (1952). In 1982, Congress reenacted Section 1823(e) unchanged. In 1989, as part of FIRREA, Congress clarified that Section 1823(e) applies in certain additional circumstances, including to claims brought against the FDIC as receiver. See 12 U.S.C. 1821(d)(9)(A), 1823(e), as amended. Meanwhile, in the nearly 60 years since *D'Oench* was decided, federal and state courts have applied the common law *D'Oench* principle—often in tandem with its statutory counterparts—to a variety of situations that do not fit the precise facts of *D'Oench*, but to which the rationale and policy concerns of the *D'Oench* doctrine attach and thus preclude reliance on secret banking agreements.

Congress is presumed to be aware of the widespread application of the common law *D'Oench* doctrine over the past half century. While it had ample opportunity to do so when it enacted, reenacted, and amended pertinent statutory provisions, Congress has never expressed disapproval of that doctrine or its application to situations outside the statutory protections. The 1950 Act and FIRREA embraced and supplemented the common law doctrine in certain respects; but, as this Court has recognized, "Congress' obvious desire to enhance the common law in specific, well-defined situations does not signal its desire to extinguish the common law in other situations." *Texas*, 507 U.S. at 535 n.4. Moreover, the evident purpose of the 1950 Act and especially FIRREA—which was designed to *strengthen* the government's hand in regulating and liquidating failed banks—strongly supports retention, not abrogation, of the common law *D'Oench* doctrine.

This Court's decisions in *Atherton* v. *FDIC*, 519 U.S. 213 (1997), and *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), do not spell the end of *D'Oench* either. Those cases held that FIRREA foreclosed the creation of *new* federal common law rules. This case deals with the quite different question whether Congress has done away with an existing and deeply entrenched common law doctrine. That question is governed by the "presumption favoring retention of existing law." *Texas*, 507 U.S. at 534.

II. The only ground that petitioner pressed in the court of appeals in arguing that the common law *D'Oench* rule does not bar his claims (assuming the doctrine has not been abrogated) is the fact that the receivership in this case ended in a surplus. The Eleventh Circuit correctly held that that quite unusual happenstance should not defeat application of the *D'Oench* principle. There is no need for this Court to address the alternative grounds that petitioner now advances for avoiding the *D'Oench* doctrine, because those issues were not addressed below and have not been fully briefed by the parties here. In any event, the application of *D'Oench* to the FDIC as receiver and then to respondent as the FDIC's successor is consistent with the important federal interests underlying the *D'Oench* doctrine.

ARGUMENT

I. CONGRESS HAS NOT ABROGATED THE LONG-STANDING FEDERAL COMMON LAW DOCTRINE ESTABLISHED BY *D'OENCH* AND ITS PROGENY

In a number of recent decisions, this Court has addressed the proper role of federal common law in our federal system. See *Atherton* v. *FDIC*, 519 U.S. 213, 218 (1997); *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994); *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 311 (1981). Under those decisions, the areas in which federal common law exists are relatively few, and they generally implicate important federal interests or the rights and responsibilities of the United States. See *Boyle* v. *United Techs., Inc.*, 487 U.S. 500, 504 (1988). In *O'Melveny*, this Court held that there was no federal interest sufficient to warrant "judicial creation" of a new federal rule of decision respecting the tort liability of professionals who provide services to federally insured banks. 512 U.S. at 89. For similar reasons, the Court in *Atherton* declined to "create[]" a new federal common law rule governing the standard of care for the directors and officers of federally insured banks. 519 U.S. at 225-226. This case, by contrast, deals with federal common law that already has been recognized by this Court and been applied by the lower courts in a multitude of cases for more than five decades.

In *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 460 (1942), the Court held that the policies underlying the federal banking laws warranted creating a common law rule protecting the FDIC and the public funds it administers against "secret agreement[s]," "scheme[s]," or "arrangement[s]" between federally insured banks and borrowers that may have the effect of misleading bank examiners or creditors as to the financial condition of such banks. Justice Jackson concurred in that result and wrote separately to

emphasize that it was "appropriate" to fashion a federal common law rule in this instance. *Id.* at 472. As he explained, the FDIC "was created and financed in part by the United States to bolster the entire banking and credit structure," and "[t]he purposes sought to be accomplished by it can be accomplished only if it may rely on the integrity of banking statements and banking assets." *Ibid.* (footnote omitted). The basic rule of estoppel enunciated in *D'Oench* is one of the most important and longstanding protections available to the FDIC and the funds it administers, the rule creates a powerful incentive for those doing business with banks to record their financial arrangements, and the rule promotes prompt and cost-effective resolution of litigation involving certain claims against banks in receivership. See p. 2, *supra*.

Congress is free to displace federal common law. But, as this Court reaffirmed in *United States* v. *Texas*, 507 U.S. 529 (1993), "'[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *Id.* at 534 (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)); accord *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) ("courts may take it as given that Congress has legislated with an expectation that [established common law] will apply except when a statutory purpose to the contrary is evident") (internal quotation marks and citations omitted). That canon accords with "the well-settled presumption that Congress understands the state of existing law when it legislates," *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988); accord *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988), and the rule that "[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change," *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989).

The question presented in this case is whether Congress has abrogated the well-established federal common law doctrine embodied by *D'Oench* and its progeny.

A. The Common Law *D'Oench* Doctrine Is Longstanding And Woven Into The Fabric Of Federal Banking Law

The *D'Oench* doctrine is deeply ingrained in federal banking law and policy. The doctrine is hardly the "mongrel" or "mut[ant]" creature conceived by petitioner (Br. 3, 22). It remains grounded in the same basic considerations articulated by this Court nearly 60 years ago in *D'Oench*; but like the prototypical common law doctrine, *D'Oench* has evolved over time. Cf. *Lutwak* v. *United States*, 344 U.S. 604, 615 (1953) ("It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.").

1. a. In *D'Oench* itself, a borrower executed a note to a federally insured bank, but made a secret agreement with the bank that the note would never be called. The FDIC acquired the note and brought suit in its corporate capacity to enforce the note; the borrower defended based on its unrecorded agreement with the bank that the note would not have to be paid. This Court concluded that the Federal Reserve Act expressed "a federal policy to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures or to which it makes loans." 315 U.S. at 457. And that federal policy, the Court held, required that the borrower be estopped from relying on its secret agreement respecting the note. *Id.* at 460-461.[2]

[2] As the Court pointed out, the result in *D'Oench* squared with background principles reflected in numerous state court cases under which "an accommodation maker [was] not allowed that defense as against the receiver of the bank and its creditors * * * where his act contravene[d] a general policy to protect the institution of banking from such secret agreements." 315 U.S. at 458.

b. In 1950, Congress enacted the Federal Deposit Insurance Act, ch. 967, § 2, 64 Stat. 873 (codified at 12 U.S.C. 1823(e) (1952)). The 1950 Act embraced the ruling in the *D'Oench* case and added to it specific approval and recording requirements. Thus, the Act provided that no "agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it" from a failed bank "shall be valid" against the FDIC in its corporate capacity, unless the agreement (i) is written, (ii) was executed contemporaneously with the acquisition of the asset by the bank, (iii) was approved by the board of directors or loan committee of the bank, and (iv) has been maintained as an official record of the bank. 12 U.S.C. 1823(e) (1952).[3]

[3] The 1950 Act was enacted in place of a bill that would have *curtailed* the *D'Oench* principle by subjecting the FDIC to any defense that a debtor could have raised against the bank, except in the case of actual fraud. H.R. 5811, 81st Cong., 1st Sess. (1949). Representative Walter drafted H.R. 5811 based on the experience of a constituent, who had lost a case against the FDIC on the ground that he was estopped—under *D'Oench*—from asserting an oral agreement with a bank to avoid payment on a note, even though he claimed that he had not lent himself to any deceptive scheme or arrangement with the bank. *FDIC* v. *Alker*, 151 F.2d 907, 908-909 (3d Cir. 1945), cert. denied, 327 U.S. 799 (1946). The FDIC and others opposed H.R. 5811 on the ground that it "would encourage secret agreements between a bank and its debtors * * * to the detriment not only of [the FDIC], but also of general creditors and uninsured depositors." *Hearings on H.R. 5811 Before the House Comm. on the Judiciary*, 81st Cong., 1st & 2d Sess. 60 (1949 & 1950) [*Hearings on H.R. 5811*] (N. Blake, Associate General Counsel, FDIC); see *id.* at 209 (explaining need for "protect[ion] against any arrangements, understandings, or agreements which are not disclosed in the records of the bank and, therefore, would not be reflected in these reports") (J. Cecil, FDIC). H.R. 5811 died in committee. Shortly thereafter, with almost no additional discussion, Congress enacted Section 1823(e).

2. a. After the enactment of Section 1823(e) in 1950, courts applied the *D'Oench* doctrine and Section 1823(e) in tandem, and permitted the FDIC to assert *D'Oench* to estop claims or defenses based on secret banking arrangements that fell outside the precise facts of *D'Oench* but within the heartland of the policies articulated in *D'Oench* and reflected in Section 1823(e). Thus, for example, courts applied the *D'Oench* principle to situations in which the FDIC was acting as receiver, even though Section 1823(e) as enacted in 1950 applied only to the FDIC in its corporate capacity. See, *e.g.*, *FDIC* v. *First Nat'l Fin. Co.*, 587 F.2d 1009, 1012 (9th Cir. 1978); *FDIC* v. *General Inv., Inc.*, 522 F. Supp. 1061, 1070 (E.D. Wis. 1981); *Dominguez* v. *FDIC*, 90 F.R.D. 595, 598 (D.P.R. 1981); *British Columbia Inv. Co.* v. *FDIC*, 420 F. Supp. 1217, 1226 (S.D. Cal. 1976); *FDIC* v. *Vineyard*, 346 F. Supp. 489, 493 (N.D. Tex. 1972); *FDIC* v. *Oehlert*, 252 N.W.2d 728, 732 (Iowa 1977); see also *FSLIC* v. *Kearney Trust Co.*, 151 F.2d 720, 725 (8th Cir. 1945) (allowing Federal Savings and Loan Insurance Corporation (FSLIC) to invoke *D'Oench* as assignee of claims possessed by failed thrift). In addition, courts held that the *D'Oench* principle protects the "FDIC from all side agreements, including those between the obligor and a third party." *FDIC* v. *Hoover-Morris Enter.*, 642 F.2d 785, 788 & nn.4-5 (5th Cir. 1981) (citing additional cases).

b. In 1982, Congress reenacted Section 1823(e). Pub. L. No. 97-320, § 113(m), 96 Stat. 1474. Thereafter, courts continued to adapt the common law *D'Oench* doctrine to situations that were not explicitly covered by Section 1823(e). See, *e.g.*, *FDIC* v. *McClanahan*, 795 F.2d 512, 514 n.1 (5th Cir. 1986) (applying *D'Oench* to bar defense raised against FDIC as receiver); *FDIC* v. *Van Laanen*, 769 F.2d 666, 667 (10th Cir. 1985) (same); *Beighley* v. *FDIC*, 868 F.2d 776, 784 (5th Cir. 1989) (same); *FSLIC* v. *Two Rivers Assoc., Inc.*, 880 F.2d 1267, 1276-1277 (11th Cir. 1989) (applying *D'Oench* to bar defense and counterclaims asserted against FSLIC);

Mainland Sav. Ass'n v. *Riverfront Assocs., Ltd.*, 872 F.2d 955, 956 (10th Cir.) (applying *D'Oench* to bar claim asserted against FSLIC), cert. denied, 493 U.S. 890 (1989); *Firstsouth, F.A.* v. *Aqua Constr. Inc.*, 858 F.2d 441, 442-443 (8th Cir. 1988) (applying *D'Oench* to bar defense against FSLIC); *FSLIC* v. *Lafayette Inv. Props., Inc.*, 855 F.2d 196, 198 (5th Cir. 1988) (per curiam) (same); *Andrew D. Taylor Trust* v. *Security Trust Fed. Sav. & Loan Ass'n*, 844 F.2d 337, 342 (6th Cir. 1988) (same); *FSLIC* v. *Maio*, 736 F. Supp. 1039, 1040 (N.D. Cal. 1989) (applying *D'Oench* to bar counterclaim against FSLIC); see also *FSLIC* v. *Sandor*, 684 F. Supp. 403, 406 n.8 (D.V.I. 1988) ("*D'Oench* still stands as a principle of federal common law."); *Beighley* v. *FDIC*, 676 F. Supp. 130, 132 (N.D. Tex. 1987) (FDIC may assert *D'Oench* as defense to claims against it), aff'd, 868 F.2d 776 (5th Cir. 1989).

In 1987, this Court recognized the continuing vitality of the policies underlying *D'Oench* in *Langley* v. *FDIC*, 484 U.S. 86, 91, 93, 94-95 (1987), which involved a dispute over the scope of the term "agreement" in Section 1823(e). A year later, this Court recognized *D'Oench* as an example of federal common law in an area "involving 'uniquely federal interests.'" *Boyle*, 487 U.S. at 504.

3. a. In 1989, Congress enacted FIRREA. That Act made express that Section 1823(e) covers defenses raised against the FDIC as receiver, the newly created Resolution Trust Corporation (in its corporate and receiver capacities), and bridge banks. See 12 U.S.C. 1823(e), as amended. FIRREA also added a provision stating that "any agreement which does not meet the requirements set forth in section 1823(e) * * * shall not form the basis of, or substantially comprise, a claim against the [FDIC as] receiver or the [FDIC in its corporate capacity]." 12 U.S.C. 1821(d)(9)(A). The legislative history of FIRREA states that the purpose of those amendments was to "clarif[y] the current provision invalidating certain secret agreements against interests of the FDIC," including by making "clear"

that the provision applies to the FDIC when it is acting as receiver and that it bars affirmative claims that are filed *against* the FDIC, not merely defenses to claims that are filed *by* the FDIC. H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. I, at 335 (1989); see *id.* at 332. The history also makes clear that the overriding purpose of FIRREA was to strengthen the hand of federal regulators, including the FDIC, to respond to the savings and loan crisis. See *id.* at 311; *United States* v. *Winstar Corp.*, 518 U.S. 839, 856-857 (1996) (opinion of Souter, J.); note 7, *infra*.

b. Following FIRREA, courts continued to apply the common law *D'Oench* doctrine in conjunction with Section 1823(e), and to invoke the common law regime to supplement the statutory protections. Thus, for example, courts applied the common law *D'Oench* doctrine to situations in which the FDIC was acting as receiver, *Timberland Design, Inc.* v. *First Serv. Bank for Sav.*, 932 F.2d 46, 49 (1st Cir. 1991) (per curiam) (citing cases); to secret banking agreements that were not confined to interests in specific existing assets, *e.g.*, *Brookside Assocs.* v. *Rifkin*, 49 F.3d 490, 495 (9th Cir. 1995); *Inn at Saratoga Assocs.* v. *FDIC*, 60 F.3d 78, 82 (2d Cir. 1995); *OPS Shopping Ctr., Inc.* v. *FDIC*, 992 F.2d 306, 309-310 (11th Cir. 1993); *Jackson* v. *FDIC*, 981 F.2d 730, 734 (5th Cir. 1992); *North Ark. Med. Ctr.* v. *Barrett*, 962 F.2d 780, 789 (8th Cir. 1992); *Timberland Design*, 932 F.2d at 49-50; *Hall* v. *FDIC*, 920 F.2d 334, 339 (6th Cir. 1990), cert. denied, 501 U.S. 1231 (1991); and to affirmative claims against the FDIC, *e.g.*, *Bowen* v. *FDIC*, 915 F.2d 1013, 1015 (5th Cir. 1990).

c. In 1994, Congress amended Section 1823(e) by adding a subsection ((e)(2)) that altered the application of Section 1823(e) to certain claims of federal, state, and local government depositors. Pub. L. No. 103-325, 108 Stat. 2160. Once again, however, Congress did not disturb the continued application of the common law *D'Oench* doctrine.

4. In 1995, a bill entitled *The D'Oench Duhme Reform Act* (S. 648, 104th Cong., 1st Sess.) was introduced in Con-

gress "to unify the lines of authority developed under the Federal common law" and "Federal statutory law." S. 648, § 2(b)(1). The bill's sponsors expressed concern that in the wake of the savings and loan crisis, *D'Oench* had become too powerful. During hearings, the FDIC explained the evolution of the *D'Oench* doctrine, the FDIC's extensive reliance on that doctrine, and the important federal interests served by *D'Oench* in the "supervision, resolution, and liquidation of banks." *Hearing on S. 648 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 104 Cong., 1st. Sess. 15 (1995) [*Hearing on S. 648*] (S. Sivertsen, Assistant General Counsel); see also *id.* at 49-69 (same); *id.* at 70-74 (M. Hileman, Assistant General Counsel, RTC).[4] Not a single sponsor or witness suggested that the common law *D'Oench* doctrine had already been abrogated by Congress; indeed, the continued existence of that doctrine was the impetus for the bill. S. 648 was never reported out of committee.

B. Neither The 1950 Act Nor FIRREA Abrogated The Common Law *D'Oench* Doctrine

Notwithstanding this history, petitioner contends that Congress has extinguished "*any* existing federal common law" (Br. 18 (emphasis added)) under *D'Oench*—if not when it enacted FIRREA, then 39 years earlier when it first enacted Section 1823(e), see Br. 16-17 n.6. Under settled rules of statutory construction, that contention does not withstand scrutiny.

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[4] After discussing the history of the *D'Oench* doctrine, the FDIC's assistant general counsel observed: "In essence, the *D'Oench* doctrine and section 1823(e) serve to ensure that all agreements or arrangements affecting the depository institution's financial condition must be recorded and available for review by regulators and receivers so that they can accurately assess the true financial condition of the institution. This public policy lies at the center of the ability of the FDIC and other regulators to supervise open institutions and to resolve failing ones." *Hearing on S. 648*, at 51 (Sivertsen).

1. As discussed above, the presumption is that Congress legislates with an "expectation" that longstanding common law principles will continue to apply, unless a contrary statutory purpose is evident. *Texas*, 507 U.S. at 534. See also *ibid.* ("In order to abrogate a common-law principle, [a] statute must 'speak directly' to the question addressed by the common law."); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."); p. 9, *supra*.

In *Texas*, the Court considered "whether Congress intended the Debt Collection Act of 1982 to abrogate the United States' federal common-law right to collect prejudgment interest on debts owed to it by the States." 507 U.S. at 530. The Court first recognized that the common law doctrine requiring all parties owing debts to the United States to pay prejudgment interest was "longstanding." *Id.* at 533. Next, the Court concluded that Congress had not abrogated that common law by enacting the Debt Collection Act, which imposed new statutory standards for the collection of interest from private parties but was "silent" on the obligation of States. *Id.* at 535. In so holding, the Court recognized that the Debt Collection Act and other statutes had codified and supplemented the common law in certain respects. *Id.* at 535 n.4. But, the Court reasoned, "Congress' obvious desire to enhance the common law in specific, well-defined situations does not signal its desire to extinguish the common law in other situations." *Ibid.* To the contrary, the Act's "evident purpose * * * to strengthen the Government's hand in collecting its debts" bolstered the conclusion that Congress did not intend to abrogate the common law rule that served the same purpose. *Id.* at 536-537.

2. As was true of the statute in *Texas*, neither the text, purpose, nor legislative history of the statutory provisions on which petitioner pins *D'Oench*'s fate establishes an intention on the part of Congress to abrogate that longstanding common law doctrine, or speaks directly to the continuing application of that doctrine in situations not addressed by Congress.

a. As we have explained, the 1950 Act codified the application of the *D'Oench* rule on facts parallel to the *D'Oench* case and enhanced that rule by adding stringent recording and approval requirements. See 12 U.S.C. 1823(e) (1952); p. 11, *supra*. While FIRREA left the core of Section 1823(e) unchanged, it made express that that provision applies to the FDIC in its capacity as receiver and to affirmative claims against "the [FDIC as] receiver or the [FDIC in its corporate capacity]." 12 U.S.C. 1821(d)(9)(A). The legislative history of FIRREA states that those amendments were simply intended to "clarif[y]" the reach of Section 1823(e). H.R. Rep. No. 54, *supra*, Pt. I, at 335. That clarification squared with the manner in which the common law *D'Oench* doctrine had been adapted and applied by lower courts since 1950. See pp. 12-13, *supra*.

In arguing that Congress has abrogated the *D'Oench* doctrine, petitioner relies (Br. 29-30) primarily on the fact that Congress has not gone *further* in codifying the common law. But *Texas* establishes that such negative inferences are insufficient to defeat the presumption favoring retention of existing common law. There, as noted above, the Court rejected the State's argument that the common law prejudgment-interest rule had been displaced when Congress "codified and made mandatory the common-law right to collect prejudgment interest at a specified interest rate," explaining that Congress's desire to strengthen the common law in certain respects did not signal an intention to extinguish the common law in other situations. 507 U.S. at 535

n.4. The same conclusion follows just as readily if not more so here.[5]

The State in *Texas* also urged this Court to infer that Congress intended to abrogate common law from the fact that the Debt Collection Act imposed a specific prejudgment-interest requirement on private persons but expressly excluded States from the Act's reach. 507 U.S. at 535. The Court rejected that interpretation, finding that "Congress's mere refusal to legislate with respect to the prejudgment-interest obligations of state and local governments falls far short of an expression of legislative intent to supplant the existing common law in th[at] area." *Ibid.* So too here. Congress's refusal to legislate with respect to the application of *D'Oench* outside the specific situations addressed by Section 1823(e) fails to establish an intent to abrogate the common law altogether. The "more logical conclusion" is that Congress left the common law doctrine "in place." *Id.* at 538.

City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981), on which petitioner relies (Br. 22, 25), is not to the contrary. In that case, this Court held that a federal common law cause of action had been abrogated by the Federal Water Pollution Control Act Amendments of 1972, reasoning that Congress's obvious intent "to establish an all-encompassing program of water pollution regulation" left "no room for courts to attempt to improve on that program with federal common

[5] *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779 (1952), is not to the contrary. That case dealt with the question whether Congress had abrogated the common law rule allowing "a set-off against a seaman's suit for wages." *Id.* at 781. Relying on the extensive "legislation passed by Congress for the protection of seaman," the Court held that Congress "has now covered this field," and that the common law rule with the *contrary* purpose of denying seaman wages had been displaced. *Ibid.*; see *id.* at 784-787. In this case, and in *Texas*, by contrast, there is no statute that conflicts with the common law rule; instead, the statutory provisions at issue are declaratory of certain aspects of the common law and undeniably *promote* the policies underlying the common law rule.

law." *Id.* at 318-319; see *id.* at 319-321 (discussing the "comprehensive" nature of the statutory program). The statutory provisions in this case, which simply codify the common law in certain respects, do not begin to establish the sort of "all-encompassing program" of regulation involved in *Milwaukee*. Cf. *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981) (concluding that "comprehensive legislative scheme[]" precluded creation of federal common law rule).[6]

b. As in *Texas*, the "evident purpose" (507 U.S. at 536) of the statutory provisions at issue in this case reinforces the conclusion that Congress has not abrogated the common law *D'Oench* doctrine. FIRREA was enacted to "expand, enhance and clarify" the powers and protections available to the FDIC and other regulators to deal with the savings and loan crisis, H.R. Rep. No. 54, *supra*, Pt. I, at 311—a crisis that threatened to saddle taxpayers with billions of dollars in bailout costs and posed enormous risk to deposit insurance funds and the thrift industry in general.[7] It would have been

[6] Petitioner suggests (Br. 29) that the 1950 Act and FIRREA meet the "'speaks directly' test" because they deal with "the subject covered by the *D'Oench* case." But that is not the correct inquiry. The Debt Collection Act dealt with the same "subject" as the common law—*i.e.*, debt collection—and even addressed the particular issue of prejudgment interest. But this Court rejected the argument that that Act abrogated the common law rule. See *Texas*, 507 U.S. at 534-535; cf. *Smith* v. *United States*, 507 U.S. 197, 204 (1993) ("The applicability of the presumption [against extraterritorial application of United States law] is not defeated here just because the FTCA specifically addresses the issue of extraterritorial application in the foreign-country exception."). As discussed above, the same conclusion follows here.

[7] See also, *e.g.*, H.R. Rep. No. 54, *supra*, Pt. I, at 330 (FIRREA was "designed to give the FDIC power to take all actions necessary to resolve the problems posed by a financial institution in default"); S. Rep. No. 19, 101st Cong., 1st Sess. 3 (1989) (FIRREA constitutes "emergency legislation * * * at a time of crisis in the Federal deposit insurance system and the thrift industry"); H.R. No. 681, 101st Cong., 2d Sess. Pt. I,

surprising, in that crisis environment, for Congress to abrogate, or even trim the edges of, a doctrine that the FDIC regards as "among the most important, long-standing, and powerful protections afforded [it] acting in either its corporate liquidator [or receiver] capacity." 62 Fed. Reg. at 5984. And there is, in fact, no indication whatever that Congress intended to do so.

In *Texas*, this Court reasoned that the fact that the Debt Collection Act was passed to "*strengthen* the Government's hand in collecting debts" indicated that Congress did not intend to abrogate an existing common law doctrine that advanced the same purpose, and thereby *weaken* the government's hand in that area. 507 U.S. at 537 (emphasis added). Likewise, FIRREA was passed to strengthen the government's hand in dealing with failed banks. And, just as was true in *Texas*, that undeniable purpose strongly supports the conclusion that in enacting FIRREA, Congress did not intend to weaken the government's hand by eliminating the substantial protections afforded the FDIC by the common law *D'Oench* doctrine.[8]

c. The complementary evolution of both the common law *D'Oench* doctrine and its statutory protections prior to FIRREA bolsters the conclusion that the further reenactment and expansion of the statutory protections in FIRREA likewise neither abrogated the *D'Oench* doctrine nor halted its continuing development. As the Eleventh Circuit explained:

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at 171 (1990) (FIRREA expands the FDIC's authority to avoid fraudulent transfers and recover fraudulently transferred property).

[8] The evident purpose of the 1950 Act also supports retention of the common law *D'Oench* rule; as discussed above, the legislative history of that Act indicates that it was passed to afford the FDIC "protect[ion] against any arrangements, understandings, or agreements which are not disclosed in the records of the bank." *Hearings on H.R. 5811*, at 209; see note 3, *supra*.

> The statute at issue began in 1950 as a partial codification of the *D'Oench* case. Subsequently, just as the *D'Oench* decision itself was a common law rule fashioned to fill the interstices of federal statutes, courts continued to apply the common law *D'Oench* doctrine beyond the confines of the statutory language in order to fulfill Congress' purposes in enacting §1823(e)(1). Thereafter, in the intervening forty years, the common law *D'Oench* doctrine and the cases under the statute evolved together, each drawing upon the other. * * * Since the creation of § 1823(e)(1) in 1950, innumerable cases in every circuit court of appeals have held that the common law *D'Oench* doctrine and the statute continued to apply and complement each other. Thus, in 1989, when Congress addressed this special area of federal concern as a small part of the overall crisis in the banking industry, Congress was looking at forty years of harmonious coexistence of the common law doctrine and the statute. When Congress merely carried over the substance of the §1823(e)(1) language, we believe that the most reasonable reading of the congressional intent is that Congress codified parts of the evolving *D'Oench* common law, left the state of the law unchanged, and left in place both the statute and the federal common law *D'Oench* doctrine to fill in the inevitable gaps left by the statutory language.

Motorcity of Jacksonville, Ltd. v. *Southeast Bank N.A.*, 83 F.3d 1317, 1333 (11th Cir. 1996) (en banc), vacated and remanded *sub nom. Hess* v. *FDIC*, 519 U.S. 1087 (1997), reinstated, 120 F.3d 1140 (11th Cir. 1997) (en banc), cert. denied, 523 U.S. 1093 (1998).[9]

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[9] Petitioner claims (Br. 23 n.10) that "this Court has never endorsed" the "evolution of the *D'Oench* doctrine in the lower courts." But the relevant question here is whether Congress, not this Court, has displaced that doctrine. Just because "*this* Court" (Pet. Br. 28) has not found it necessary to expound upon or review lower court decisions applying

Congress has had ample opportunity to express disapproval of the common law doctrine that for more than half a century has developed along side and become intertwined with the statutory *D'Oench* protections. Yet Congress did not do so when it enacted Section 1823(e) in 1950; when it reenacted Section 1823(e) in 1982; when it expanded Section 1823(e) and added Section 1821(d)(9)(A) in 1989; or when it amended Section 1823(e) in 1994. In light of that history, Congress must be understood to have intended FIRREA to codify the evolving common law *D'Oench* doctrine in certain respects and, as before, to leave room for the continued evolution of the *D'Oench* doctrine. That understanding is further bolstered by the fate of the proposed *D'Oench, Duhme Reform Act* in 1995, see pp. 14-15, *supra*, which *would* have accomplished essentially the same legislative reform that petitioner now seeks at the hand of this Court.[10]

C. Neither *O'Melveny* Nor *Atherton* Justifies The Conclusion That Congress Has Abrogated The *D'Oench* Doctrine

The bulk of petitioner's argument rests on the premise that the question whether Congress abrogated the *D'Oench* doctrine has already been decided by this Court in

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D'Oench does not mean that the common law doctrine has been frozen in time, or that Congress overlooked the practically legion case law applying *D'Oench* in federal and state courts. In any event, in 1988—on the eve of FIRREA—this Court cited *D'Oench* as an example of valid federal common law. *Boyle*, 487 U.S. at 504.

[10] The FDIC's 1997 policy statement has no bearing on whether Congress abrogated the *D'Oench* doctrine eight years earlier in FIRREA. See note 1, *supra*; cf. Pet. 15 (arguing that the FDIC's policy statement is "legally meaningless"). In any event, the FDIC has consistently maintained that Congress has not abrogated the *D'Oench* doctrine, and its 1997 policy statement is based in part on the FDIC's understanding that Sections 1821(d)(9)(A) and 1823(e) "should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine." 62 Fed. Reg. at 5984.

O'Melveny and *Atherton*. But those cases do not even mention *D'Oench*, and, more to the point, they were addressed to the quite different question whether Congress, in FIRREA, had authorized the "creation" of new federal common law rules to govern areas far removed from the protections or the policies of *D'Oench*. 512 U.S. at 89; accord 519 U.S. at 225-226.

1. *O'Melveny* involved a suit brought by the FDIC in its capacity as receiver against the attorneys for a failed bank. The question presented was whether federal or state law governed the "tort liability of [the] attorneys." 512 U.S. at 81. In concluding that state law controlled, the Court first held that there was no existing federal common law rule on point. *Id.* at 83. Then the Court held that in enacting FIRREA, Congress did not authorize the courts "to promulgate such common law." *Id.* at 86; see *id.* at 87 ("this is not one of those cases in which judicial creation of a special federal rule would be justified"); *id.* at 88 (FIRREA does not authorize "judicial creation of new, 'federal-common-law' causes of action"); *id.* at 89 ("judicial creation of a federal rule of decision is [not] warranted").

Atherton is to the same effect. It involved a suit brought by the Resolution Trust Corporation (RTC) against the officers and directors of a failed bank. The question presented was whether federal or state law established the relevant "standard of care." 519 U.S. at 215. Following *O'Melveny*, the Court held that state law generally supplied the standard of care because there was no existing federal common law rule on point, and there was no basis for "judicial creation of a special federal rule." *Id.* at 218 (quoting *O'Melveny*, 512 U.S. at 87); see *id.* at 219-226. In so holding, the Court recognized that "this Court did once articulate federal common-law corporate governance standards, applicable to federally charted banks," *id.* at 217 (citing *Briggs* v. *Spaulding*, 141 U.S. 132 (1891)), but it concluded that that general federal common law rule "did not survive

this Court's later decision in *Erie* v. *Tompkins*," *id.* at 226. (*D'Oench*, of course, was decided after *Erie* and thus could not have been overridden by *Erie*.)

2. *O'Melveny* and *Atherton* cannot bear the weight that petitioner places on them here. Neither case concerned whether Congress had abrogated an existing or, *a fortiori*, longstanding federal common law rule—the question presented in *Texas* and here. Instead, the cases concerned whether Congress had authorized the "creation" of common law. *O'Melveny*, 512 U.S. at 87, 88, 89; *Atherton*, 519 U.S. at 218. This Court has emphasized that with respect to already-existing federal common law principles, the presumption is that Congress is aware of such principles and "legislate[s] with an expectation that [they] will apply." *Texas*, 507 U.S. at 534 (internal quotation marks omitted). In this regard, we agree with petitioner (Br. 23) that *Texas* does not represent a "departure from" from the analysis applied in *O'Melveny* and *Atherton*. *Texas* applied the "presumption favoring retention of *existing* [common] law," 507 U.S. at 534 (emphasis added), and that presumption simply was not implicated in *O'Melveny* or *Atherton*.

Because the Court's analysis in *O'Melveny* was focused on whether FIRREA authorizes the creation of new federal common law, the Court's "*exclusio alterius*" analysis (512 U.S. at 86) does not govern this case. While such a negative inference may be sufficient in many cases to foreclose the creation of new common law rules, an inference based on silence in a statutory scheme is insufficient to defeat the presumption favoring retention of existing common law. See *Texas*, 507 U.S. at 535 & n.4; pp. 17-18, *supra*. Moreover, while the *O'Melveny* Court concluded that the fact that FIRREA established a "scheme" (512 U.S. at 87) of rights possessed by the FDIC as receiver indicates that Congress did not intend for courts to add rights to that scheme, it by no means follows that in enacting that scheme Congress intended to abrogate the common law doctrine that had for

decades already developed around *one* of those statutory rights.

Petitioner tries (Br. 26) to force this case into the *O'Melveny* and *Atherton* mold by arguing that respondent seeks the creation of common law insofar as he seeks to apply *D'Oench* beyond the precise facts of that 58-year-old case. That argument is without merit. While firmly rooted in this Court's decision in *D'Oench*, the *D'Oench* doctrine has not been frozen in time. In the nearly 60 years since *D'Oench* was decided, courts have applied the common law doctrine to varying situations that do not fit the precise facts of *D'Oench* and that in many respects are the product of events or crises in the banking system that have taken place since *D'Oench*. In those cases, the courts did not create a *new* federal common law rule; they simply applied the existing one (*i.e.*, *D'Oench*) to different facts. That is how common law invariably functions. See *Lutwak* v. *United States*, 344 U.S. at 615, quoted at p. 10, *supra*. As we explain in Point II, *infra*, the court of appeals correctly concluded that the common law *D'Oench* doctrine bars petitioner's reliance on the secret banking agreement in this case. But even if this Court were to disagree on that point, it should reject petitioner's invitation (Br. 18 (emphasis added)) to hold—under the rubric of *O'Melveny* and *Atherton*—that FIRREA "negate[s] *any* existing federal common law."

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE COMMON LAW *D'OENCH* DOCTRINE BARS PETITIONER'S CLAIMS

When federal common law exists, it is appropriate for courts to draw upon that law and "apply the traditional common-law technique of decision." *D'Oench*, 315 U.S. at 472 (Jackson, J., concurring). In doing so here, the court of

appeals correctly held that petitioner's claims are barred by the *D'Oench* principle.[11]

1. The only ground that petitioner pressed in the court of appeals for circumventing the common law *D'Oench* doctrine (assuming it survives FIRREA) is that the "doctrine does not apply in cases where the receivership has generated a surplus." Pet. App. A13; see *id.* at A7; Pet. C.A. Br. 2, 11, 23-24; Pet. C.A. Reply Br. 3, 8-9, 13-16. We agree with the Eleventh Circuit that there is no basis for carving out an exception for this unusual circumstance; "the rationale of *D'Oench*, *Duhme*—to protect the FDIC from enforcement of oral agreements against failed institutions—is no less compelling if the failed institution eventually generates a surplus." Pet. App. A14. Cf. *Langley* v. *FDIC*, 484 U.S. at 95 ("The harm to the FDIC caused by the failure to record occurs no later than the time at which it conducts its first bank examination that is unable to detect the unrecorded agreement and to prompt the invocation of available protective measures."). Moreover, adopting a surplus exception could prolong resolution of claims filed by or against the FDIC involving unrecorded banking agreements, and thereby hamper the receivership, simply due to the remote possibility that a surplus will ultimately emerge.

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[11] When it was the receiver and a party to this case, the FDIC argued that petitioner's claims were barred by Section 1823(e) as well as the common law *D'Oench* rule. Pet. App. B3. Because the court of appeals based its decision on application of the common law rule and the continuing viability of that rule is the basic issue on which this Court granted certiorari (see Pet. i), there is no occasion for this Court to decide whether Section 1823(e) (or Section 1821(d)(9)(A), on which the FDIC did not separately rely in this case) would bar petitioner's claims. We do note, however, that, contrary to the District of Columbia Circuit's view (Pet. App. C7), the FDIC has taken the position that although Section 1821(d)(9)(A) incorporates the formal requirements of Section 1823(e) for recognizing a banking agreement, Section 1821(d)(9)(A) does not condition the protection it affords with respect to claims against the FDIC on a showing of an effect on a specific existing asset. See 62 Fed. Reg. at 5984.

In this Court, petitioner does not rely on this surplus theory to avoid application of *D'Oench*. Instead, he relies primarily on the argument that the common law *D'Oench* doctrine has been entirely abrogated. In support of that argument, petitioner briefly argues that the *D'Oench* doctrine does not apply to the FDIC as receiver, affirmative claims against the FDIC, or successors of the FDIC. See Pet. Br. 26-29. But petitioner did not make those arguments in the court of appeals below as alternative grounds for avoiding the application of the *D'Oench* doctrine, and the court of appeals therefore did not consider or decide those issues. This Court should decline to reach them in the first instance here. See, *e.g.*, *NCAA* v. *Smith*, 525 U.S. 459, 469-470 (1999) (refusing to reach "alternative theories" not decided below) (citing cases); *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988) (The Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied on below.").

2. In any event, the important federal policies underlying the common law *D'Oench* doctrine and its statutory protections are served by holding that petitioner may not rely on the unrecorded banking arrangement in this case in seeking to recover against the FDIC as receiver or its lawful successor.

As numerous courts have held, and as Congress affirmed in FIRREA, the *D'Oench* principle extends to the receivership context. The FDIC relies heavily on bank records in conducting the receivership of a failed bank. For example, to minimize the impact and hardship on uninsured depositors and creditors, the FDIC often pays cash dividends on receiver's certificates issued to depositors and creditors; the FDIC's ability to pay such dividends depends on being able to estimate the receivership's assets and liabilities from existing bank records. See *Hearing on S. 648*, at 52-53 (Sivertsen). In addition, as receiver, the FDIC has a duty to creditors to protect the estate and preserve often scarce

resources. Permitting parties to proceed against the FDIC on the basis of unrecorded agreements with a failed bank would force the FDIC to incur additional legal expenses in defending against such fact-intensive claims, and could result in the payment of unsubstantiated claims to the detriment of the estate in general. Likewise, allowing parties to defend claims brought by the FDIC on the basis of unrecorded agreements would hamper the receiver's ability to collect recorded obligations owed to a bank. That consequence, in turn, could affect the cost to the FDIC, and thus to the taxpayer, of rescuing failed banking institutions.

The federal policies underlying *D'Oench* are also implicated with respect to liabilities arising from normal banking transactions, which the FDIC assumes when it steps into the shoes of a failed bank as receiver and which may be made part of a purchase-and-assumption agreement with another bank. "If the general public policy is to permit regulators and receivers to rely on the institution's records to determine its financial condition, there is no logical justification to differentiate between secret agreements that affect assets and ones that create liabilities because liabilities can also alter the true financial condition of a financial institution." *Hearing on S. 648*, at 50 (Sivertsen). That is particularly true with respect to unrecorded agreements entered into in connection with lending transactions that themselves involve specific bank assets. In this case, for example, petitioner, in arguing that Southeast entered into a joint venture with Orchid, insists that he should be permitted to rely on a secret agreement that conflicts with the express terms of loan documents that bank examiners and creditors must rely upon in assessing the financial condition of a failing or failed bank.[12]

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[12] See also *Motorcity of Jacksonville*, 83 F.3d at 1336 ("The *D'Oench* doctrine bars all claims—even those sounding in tort—that are sufficiently intertwined with regular banking transactions, such that exclusion of the alleged secret agreement accords with the underlying policies of *D'Oench*.") (internal quotation marks omitted); see *id.* at 1334-1336 (discussing application of *D'Oench* with respect to agreements that do not pertain to specific existing assets); *Hall* v. *FDIC*, 920 F.2d 334, 339 (6th Cir. 1990) (same), cert. denied, 501 U.S. 1231 (1991). In addition, parties should not be allowed to circumvent the *D'Oench* rule simply by pleading claims sounding in tort; such a pleading-based exception would eviscerate the important policies underlying *D'Oench*. See *Hearing on S. 648*, at 54 (Sivertsen); *Langley* v. *FDIC*, 484 U.S. at 93 (recognizing that Section 1823(e) and the policies underlying *D'Oench* extend to agreements involving misrepresentations of fact).

Finally, the fact that respondent succeeded the FDIC pursuant to 12 U.S.C. 197 in the fourth year of this litigation should not defeat the application of *D'Oench* either. Section 197 agents assume the rights and responsibilities of the FDIC as receiver. Cf. *Ex parte Chetwood*, 165 U.S. 443, 459 (1897) ("The agent proceeds in the settlement with like authority to that conferred upon the receiver."). Section 197 specifically directs the FDIC to transfer control over the receivership and any remaining matters to the agent. See 12 U.S.C. 197(a). Allowing Section 197 successors to maintain the FDIC's position with respect to the applicability of *D'Oench* not only gives effect to that statutory scheme, but promotes the federal interests in deterring secret banking arrangements. Conversely, there is no sound reason to allow claims based on secret banking agreements that would be unenforceable against the FDIC to spring back to life simply because, due to the course that a particular lawsuit or receivership might take, the FDIC is succeeded by a Section 197 agent before litigation filed against the FDIC-receiver is concluded.[13]

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[13] Courts have recognized that the *D'Oench* protections extend to successors in other contexts. For example, one of the most common and important ways in which the FDIC seeks to minimize losses and protect depositors is through purchase-and-assumption agreements. If the *D'Oench* principle did not extend to the FDIC's successors in that context, then "purchasers would be discouraged from acquiring assets from [the

CONCLUSION

The judgment of court of appeals should be affirmed.

Respectfully submitted.

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FDIC] in the future, and [the FDIC] would find it more difficult to protect the assets of failed institutions." *Porras* v. *Petroplex Sav. Ass'n*, 903 F.2d 379, 381 (5th Cir. 1990); see also *Castleglen, Inc.* v. *RTC*, 984 F.2d 1571, 1577 (10th Cir. 1993) (The *D'Oench* doctrine "would be vitiated if a successor in interest could not enjoy the same protection.").